

Formal Consultation



Types of Consultation-Review

- *Informal Consultation:* Action “may affect” but is “not likely to adversely affect” listed species or CH
 - Effects are discountable, insignificant or beneficial
 - “Take” will not occur
- *Formal Consultation:* Action “may affect” and is “likely to adversely affect” listed species or CH
 - Direct and/or indirect effects will result in incidental “take”

Formal Consultation

- It's not the end of the world!
- Efforts should be made by both the Service and Action Agency/applicant to first avoid adverse effects through informal consultation
- If all adverse effects cannot be avoided, formal consultation is required.

Section 7 review

- Directs Federal agencies to use their authorities to conserve listed species and, in consultation with the Service, **ensure that their actions do not jeopardize the continued existence of any listed species or destroy or adversely modify CH**
- Formal consultation addresses the jeopardy standard: Are the anticipated adverse effects likely to jeopardize the continued existence of the species in question or adversely modify CH?

Jeopardy

- “Jeopardize the continued existence of” means to engage in an action that is reasonably expected to reduce appreciably the likelihood of survival and recovery of a listed species



Destroy or Adversely Modify Critical Habitat

- A direct or indirect alteration of physical or biological features (by a Federal action) that diminishes the value of Critical Habitat for both the survival and recovery of a listed species



Formal Consultation

- Federal action agency must request from the Service a current species list within 180 days of initiating formal consultation.
- Federal action agency must request initiation of formal consultation
- Typically formal consultation is triggered by the submittal of a complete initiation package to the Service by the Action Agency

Components of the Initiation Package

Often referred to as a Biological Assessment

- Description of action
- Description of area affected by the action
- Description of listed species/CH that may be affected
- Description of how they may be affected
- Relevant reports prepared on the proposal
- Other relevant studies or available information

*ESA requires the action agency to provide the best scientific and commercial data **available***

Description of Action

- Include **all aspects** of the action!
 - Location, duration, methods, purpose of action, Action Agency, Applicant
 - Interrelated or interdependent actions
 - Avoidance and/or minimization measures
 - Staging, waste, borrow areas, access roads
 - Mitigation actions, erosion controls
 - Temporary vs. permanent impacts

Description of Action Area

- Action Area: The area that encapsulates the reach of all the direct and indirect environmental impacts of the project. The area in which the biotic, chemical, and physical impacts to the environment are anticipated to occur.
- NOT based on biology of species
- Only ONE action area for a given project

Action Area

- Includes
 - Footprint of action (include things like mitigation areas, staging areas, access roads)
 - Downstream water quality impacts
 - Air quality impacts
 - Noise
 - Secondary development caused by project



Action Area

- Once you have determined the action area, map it.
- Describe habitat features within action area
 - Forest types and descriptions
 - Streams
 - Wetlands
 - Other upland habitats
 - Previously developed/disturbed areas
- Photographs are also useful

Listed Species/Critical Habitat affected

- Include list of affected species/CH
- Assuming that informal consultation has already been completed:
 - Do not include “no effect” species
 - “Not likely to adversely affect” species may be covered by describing briefly (less than one page) how consultation was concluded.



Listed Species/Critical Habitat

- For Affected species, include
 - Life history/habitat requirements, esp. breeding, feeding, sheltering
 - Aspects of species biology that relate to impacts of action
 - Local info on affected individuals or populations, survey results, etc.
 - Where in action area species are likely to occur
 - Quantify habitat in action area, impacted, preserved
 - Use best scientific/commercial info available

How will species be affected?

- Things to consider:
 - Habitat loss, fragmentation
 - Increased predation
 - Home range, dispersal, migration paths
 - Secondary developments
 - Threats identified in recovery plans
 - Sensitivity to noise, water quality, dust, etc.

Measures to protect affected species

- Include avoidance/minimization measures already identified during informal consultation
- Other measures proposed as part of complete action that will help to reduce impacts
- Eg.) measures to reduce surface water runoff in stormwater permit could reduce impacts to listed mussels

Other relevant info



- Include copies of:
 - Surveys for species in/near Action Area
 - Relevant reports (eg., EA/EIS, other NEPA documents)
 - Habitat surveys
 - Wetland delineations
- Only include **relevant** information

Evaluation of the Initiation Package

- Service evaluates
 - Have the components been provided?
 - If so, the consultation was initiated on the date received by the Service
 - Within 30 working days, the Service provides written acknowledgement of the consultation request and advises the action agency of any data deficiencies

Statutory Time Requirements

- Formal Consultation
 - Action agency prepares BA within 180 days of receiving species list
 - Concludes 90 days after its initiation (may be extended for a specific time period if USFWS and the Federal agency mutually agree)
 - Biological Opinion is issued within 45 days after ending formal consultation

Biological Opinion (BO)

- What is it?
 - The Service's evaluation of effects to the species/CH
 - Jeopardy analysis
 - Usually includes Incidental Take Statement which authorizes take of listed animals by Action Agency/Applicant on specific project



Components of a BO

- Description of the proposed action
- Status of the species (range-wide)
- Environmental baseline
 - Status of species in action area
- Effects of the action
 - Direct, indirect, interrelated, interdependent
- Cumulative effects
- Conclusion
 - Jeopardy or non-jeopardy

Biological Opinion

Jeopardy analysis must consider:

- Status of the species range-wide
- Environmental baseline (current status of species in action area)
- Effects of the action—direct, indirect, interrelated, interdependent
- Cumulative effects—effects of future state, tribal, local, private actions reasonably certain to occur within the action area

Non-jeopardy Biological Opinion

- If the Biological Opinion determines non-jeopardy, then BO will include Reasonable and Prudent Measures



Reasonable and Prudent Measures

- RPMs
 - *Mandatory* actions that the Service believes necessary and appropriate to minimize the impacts; i.e., amount or extent of incidental take
 - Generally describe actions required to minimize take---NOT MITIGATION
 - Incidental take measurement in BO is derived before consideration of RPMs

Terms and Conditions

- Specific methods to accomplish each RPM
- Clear, precise and enforceable
- Only minor changes to proposed action
- Include reporting and monitoring requirements



Conservation Recommendations

- **Discretionary measures** to minimize or avoid adverse effects of an action on listed species or critical habitat, or develop information
- Can be proactive; benefit the species
 - Can be more than a minor change
 - Can be beyond the scope of the action under review
 - Good resource for recovery actions [Sec 7(a)(1)]

Incidental Take Statement

- Incidental take--take that results from, but is not the purpose of, an otherwise lawful activity
- The Service must articulate the amount or extent of take expected from the proposed action



Incidental take statement

- Ties back to analysis of effects
- Identifies the form and cause of incidental take
- Identified amount and extent of take
- Considers impact of take over time and space



Photo/image: Donald R. Gunn (1977)

Incidental take statement

- Points to consider
 - Take expressed in number of individuals, not acres of habitat
 - No ITS for plants b/c no take prohibition
 - If incidental take allowed in statement is exceeded, consultation must be reinitiated

Post-opinion requirements

- Action Agency must comply with RPMs and T&Cs, including monitoring
- Action Agency encouraged to notify Service when implementing any conservation recommendations



Jeopardy Biological Opinion

- Jeopardy: an action that would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species



Jeopardy BO

- Reasoning for jeopardy should be clearly described throughout document, based on:
 - Status of species
 - Environmental baseline
 - Effects of action
 - Cumulative effects



Jeopardy Biological Opinion

- If the Biological Opinion determines jeopardy, then the BO will include Reasonable and Prudent Alternatives



Reasonable and Prudent Alternatives

- RPAs must:
 - Be consistent with the intended purpose of the action
 - Be consistent with the scope of the Federal agency's legal authority
 - Be economically and technologically feasible
 - Not jeopardize the continued existence of listed species or result in adv. mod. of CH

Jeopardy BO

Post-Opinion Requirements of Federal Action Agency

Choose one of the following:

- Implement one of the RPAs
- Disagree with the BO and proceed with proposed action
- Apply for an exemption
- Decide not to undertake the action
- Reinitiate the consultation by modifying the action